COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 01-0205-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. FARRELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Michael J. Farrell appeals his conviction of operating a motor vehicle while intoxicated (OMVWI), in violation of WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

§ 346.63(1)(a). He argues that the circuit court erred in refusing to suppress the results of his blood test. He concludes the circuit court was in error because a breath test was available, and therefore the blood test was an unreasonable search and seizure. We conclude that the issue presented is controlled by ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, and additionally, Farrell consented to his blood being drawn. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

¶2 On December 3, 1999, Dane County deputies responded to the scene of a one-car accident. When they arrived, they noted that the vehicle had rolled over but the driver was not there. One of the officers questioned a witness to the accident, who said there was only one person occupying the vehicle and that he was driving very fast as he approached a curve in the roadway, causing him to lose control of the vehicle. He stated that the driver exited the vehicle and appeared to be extremely intoxicated. He was stumbling so badly that he could hardly walk. He was also behaving in a very loud and boisterous fashion. Because of the conduct of the driver, another citizen took the driver to his home. It was at the home of that second citizen that Deputy Eric Novotny interviewed Farrell.

¶3 Novotny noticed a very strong odor of intoxicants emanating from Farrell and that his speech was extremely slurred, at times to the point where Novotny could not understand what Farrell was saying. Farrell admitted he had consumed alcohol. However, he refused to submit to a field sobriety test. Based on his observations, Novotny placed Farrell under arrest for OMVWI and took him to Meriter Hospital to obtain a blood draw pursuant to WIS. STAT. § 343.305(4).

¶4 Upon arrival at Meriter Hospital, Novotny read Farrell the Informing the Accused Form and asked if he would submit to a blood test. Farrell agreed to do so. The test showed that he had a blood alcohol content of .213. He was then charged both with OMVWI, in violation of WIS. STAT. § 346.63(1)(a), and with driving with a prohibited alcohol content, in violation of § 346.63(1)(b).

¶5 When the matter came before the circuit court, Farrell moved to suppress his blood test, claiming that the blood test was an unreasonable search and seizure in violation of the Fourth Amendment because a breath test was also available. The circuit court denied his suppression motion, and Farrell pled guilty to OMVWI as a fourth offense.

DISCUSSION

Standard of Review.

¶6 When we review a motion to suppress evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, the application of constitutional principles to the facts as found by the circuit court is a question of law that we decide *de novo*. ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47, 49-50 (Ct. App. 1995).

Unreasonable Search.

¶7 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST. amend. IV. Warrantless searches are presumed to be unconstitutional unless certain circumstances create an exception to the Fourth Amendment's requirement of a search warrant. ***New York v. Quarles***, 467 U.S. 649, 653 n.3 (1984). The use of a warrantless blood draw to detect intoxication in

motorists suspected of drunk driving has been held to be constitutionally permissible. ***Breithaupt v. Abram***, 352 U.S. 432, 439-40 (1957). ***Schmerber v. California***, 384 U.S. 757 (1966), also has held such blood tests constitutionally permissible, and the Wisconsin Supreme Court has held them constitutional, adopting the standards set out in ***Schmerber***. ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993).

¶8 Furthermore, this court has reviewed the above United States Supreme Court precedent and the precedent of the Wisconsin Supreme Court under circumstances identical to that submitted by Farrell. We did so in ***Thorstad*** and concluded that drawing Thorstad's blood was not an unreasonable search because the four elements of ***Bohling*** were satisfied. We also addressed the Ninth Circuit case of ***Nelson v. City of Irvine***, 143 F.3^{d} 1196 (9th Cir. 1998), which Farrell repeatedly argues to us as precedent for his position. We specifically declined to follow ***Nelson*** in ***Thorstad***, and we will not address those arguments again in this opinion.

¶9 ***Bohling***, which adopted the four-part test of ***Schmerber,*** requires that in order for a blood test to be constitutionally permissible, the following four requirements must be met:

> (1) The blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk driving-related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

Bohling, 173 Wis. 2d at 533-34, 494 N.W.2d at 400 (footnote omitted). Here, it is uncontested that the blood draw was taken to obtain evidence of intoxication from

a person who was lawfully arrested for a drunk driving-related violation. Second, there was a clear indication that the blood draw would produce evidence of intoxication, based upon Farrell's inability to control his automobile, Farrell's stumbling and inability to walk, Farrell's strong odor of intoxicants, Farrell's admission of alcohol consumption and Farrell's extremely slurred speech. Third and fourth, it is uncontested that the blood draw was done in a reasonable manner and that he consented[2] to having blood drawn without objection. Accordingly, we conclude that the blood draw at issue in this case was not a violation of Farrell's Fourth Amendment rights, and therefore we affirm the judgment of the circuit court.

CONCLUSION

¶10 We conclude that the issue presented is controlled by ***Thorstad*** and additionally, Farrell consented to his blood being drawn. Accordingly, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

[2] Consent to a search removes constitutional impairments unless it was not voluntarily given. ***State v. Phillips***, 218 Wis. 2d 180, 191-95, 577 N.W.2d 794, 799-801 (1998). Here, it is uncontested that the consent was voluntarily given.